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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner,

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE [1]

The National Mass Retailing Institute ("NMRI") is a nonprofit trade association of mass merchandise retailers. NMRI's 140 members operate over 20,000 retail stores throughout the United States and generate over $126 bil-

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[1] Pursuant to Supreme Court Rule 36.2, both parties to this case—Business Electronics Corporation and Sharp Electronics Corporation—have granted written consents to this filing. Those consents have been filed with the Clerk of the Court.

lion in annual sales. NMRI members range in size from one-store businesses in rural communities to multi-billion dollar chains operating thousands of stores throughout the nation.

Although of diverse sizes, NMRI members share a common marketing approach: mass retailers offer consumers a wide variety of quality products at competitive, discount prices. NMRI members believe that consumers benefit from vigorous retail competition—be it competition among stores selling different products (inter-brand competition) or competition among stores selling the same product (intra-brand competition). In either case, consumers enjoy the lower prices which result from competition. At the same time, NMRI members know that consumers often desire certain services, such as promotional information, point-of-sale instructions, warranty protection, repair capability, or product return policies. NMRI members provide those services. In short, NMRI members strive to offer consumers the desired blend of low prices and needed services. If statistics are any measure, consumers have embraced the industry's marketing approach: mass retailers' sales volume, it has been estimated, has grown over 3400% in the last 25 years.[2]

Above all else, the mass retailing industry owes its success, and its survival, to a retailer's ability to offer brand name products at competitive, discount prices. Mass retailers' operations, as a rule, are marked by high volume sales at low profit margins; prices to consumers are generally well below manufacturers' suggested retail prices. Absent the legal ability to discount, the mass retailing industry could vanish; armed with the right to discount, however, the industry will continue to contribute substantially to the national economy.

NMRI is no stranger to the issues raised in this case. For over a decade, NMRI has labored to preserve the rule

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[2] *True Look at the Discount Industry*, 26 The Discount Merchandiser 37, 43 (1986).

of law that resale price maintenance is illegal *per se*. Mass retailers have sought to protect their right to offer discounts without fear of being terminated by manufacturers, acting in concert with competing dealers which have raised price competition complaints. Over the years, NMRI has testified before Congress, conferred with the executive branch, and participated in litigation, urging the continued retention of the venerable rule of antitrust law that resale price maintenance, in all of its various manifestations, is *per se* illegal.

For example, in 1975, NMRI and others urged Congress to repeal the federal statutes enabling states to enact so-called "fair trade" laws which permitted manufacturers to fix the resale price of brand name goods. These efforts culminated in Congress' enactment of the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. §§ 1, 45(a) (1976)). That Act was tantamount to a codification of the *per se* rule prohibiting resale price maintenance. During the past seven years, as some antitrust enforcement officials have criticized the *per se* rule, NMRI has actively urged Congress to preserve the rule. Congress, in turn, has repeatedly forbidden the antitrust law enforcement agencies from taking steps to change the *per se* rule. NMRI also filed an *amicus* brief in this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), urging the retention of the *per se* prohibition of resale price maintenance.

In short, because the right to discount is the industry's life blood, NMRI has been and remains active on this important issue. NMRI's views are consistent and straightforward: (1) resale price maintenance is and must remain illegal *per se*; and (2) the *per se* ban applies to conspiracies between manufacturers and higher priced merchants to deny products to lower priced dealers simply because those dealers discount.

This Court's position on this issue has been equally consistent: for over 75 years, the Court has recognized that price fixing is illegal *per se* and, further, that conspiracies to eliminate price competition are included within the *per se* prohibition. Nonetheless, the opinion issued below by the United States Court of Appeals for the Fifth Circuit seeks to erode the *per se* rule by requiring proof not readily found in every "price fixing" case: proof that there was a direct agreement to fix prices "at some level," rather than "merely" proof of a direct agreement to eliminate price competition. This opinion threatens NMRI's members, for it, in effect, sanctions *all* agreements between manufacturers and higher priced retailers to terminate discounters *simply because they are discounters.* To protect the mass retailing industry's hard-earned market position and—more importantly—to preserve consumers' benefits derived from vigorous price competition, NMRI urges the Court to reverse the decision below and to reinstate the jury's verdict. That jury, properly instructed in the law, correctly condemned a conspiracy between Sharp Electronics Corporation ("Sharp") and a higher priced retailer, Hartwell, to terminate petitioner, Business Electronics Corporation ("Business Electronics"), because of its competitive prices.

SUMMARY OF ARGUMENT

The purpose of the Sherman Act is to preserve "free and unfettered competition." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 4-5 (1958). To accomplish that purpose, this Court and Congress have declared that both intra-brand price and inter-brand price fixing conspiracies are illegal *per se.* This Court and Congress have defined "price fixing" to include a wide variety of practices aimed at eliminating price competition. The present case involves one such practice: the agreement between a higher priced retailer and a manufacturer to eliminate intra-brand competition by eliminating a price cutting

retail competitor as a vendor of the manufacturer's product.

At its simplest level, this case may be only a routine jury instruction case, of importance principally to the litigants. It concerns the propriety of a specific jury instruction in the context of the parties' trial strategies, the evidence presented, and the defendant's seeming acceptance of the notion that the *per se* rule embraces the elimination of price discounting. At that level of analysis, affirmance of the jury's verdict and the trial court's judgment is an easy matter for this Court: the trial court did not grant the particular instruction subsequently mandated by the appellate court for the good and sufficient reason that defendant Sharp, in its entire package of proposed instructions, had not consistently insisted on that instruction.

Rather, Sharp had agreed with plaintiff Business Electronics that, if the *per se* rule was appropriate to any vertical case, it applied to a conspiracy to "eliminate price competition." Indeed, in proposed instruction No. 24, Sharp requested such an instruction. That Sharp did so is hardly surprising—well-settled antitrust jurisprudence has long equated the concerted elimination of price competition, or the concerted elimination of price cutting, with "price fixing." Viewing Sharp's proposed instructions as a whole, Sharp simply did not consistently insist on, and the trial judge thus did not give, an instruction that the jury must find an agreement that prices would be set "at some level." Had the defendant consistently insisted on that instruction, the issue ostensibly before the Court would be more clear-cut: must there be an agreement on resale prices "at some level" to implicate the *per se* rule in vertical price cases?

That issue, while a more substantial public policy issue, can also be easily resolved by this Court. Decades of Congressional findings and judicial rulings on price fixing issues compel a reversal of the decision below. An agree-

ment between a manufacturer and a higher priced retailer to terminate a price cutter, and thereby eliminate price competition, is illegal *per se*. That agreement serves no procompetitive purpose; indeed, it is the antithesis of intra-brand price competition. It is starkly at odds with the mandate of the antitrust laws that there shall be "free and unfettered" price competition, be it inter-brand competition or intra-brand competition. An agreement to eliminate a price cutter allows the complaining dealer, with the manufacturer's approval, to set prices free from competition from the discounter. That agreement produces the same economic effect as if the manufacturer and its dealers were illegally to agree on a specific price for the product. In either case, there is an agreement to eliminate intra-brand price competition between dealers, which will almost always result in higher prices for the product. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980).

Certainly under the jurisprudence of horizontal antitrust cases, agreements to eliminate price competition have always been treated as *per se* illegal "price fixing." For example, the United States has recently brought *criminal* charges against competitors who agreed only to eliminate discount coupons for branded products and did not also agree to set prices "at some level." *United States v. Waldbaum, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,689 (D. Conn. 1984).

This Court, too, has long upheld price fixing charges against defendants who sought to defend antitrust charges by denying the existence of an agreement to fix prices "at some level." From *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) to *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), this Court has ruled that an agreement to eliminate discounts "falls squarely within the traditional *per se* rule against price fixing." 446 U.S. at 648. It is a very short step—indeed, no step at all—to conclude that, in vertical cases too, an agreement to eliminate discounters also "falls squarely within the traditional *per se* rule against [vertical] price fixing." *Id.* While some may suggest analytical differences between horizontal and vertical *non-price* restraints, there should be no different result in defining what is "price fixing" in a horizontal case and what is "price fixing" in a vertical case. *Midcal*, 445 U.S. at 102-03. Price fixing in either context includes a concerted agreement to eliminate discounts—or discounters. In either context, the effect is the same: higher prices.

Finally, even if there were any further doubt about it, Congress has recently resolved the issue. Within the last two years, Congress declared that a successful prosecution of a vertical price fixing case does *not* depend on proof of an explicit agreement to set specific prices. H.R. Rep. No. 399, 99th Cong., 1st Sess. 14 (1985).

In short, this Court's precedent, Congressional enactments, economic policy, and even the defendant's own package of jury instructions point to one conclusion: conspiracies to eliminate discounters, simply because they are "price cutters," are illegal *per se*.

ARGUMENT

I. A CONSPIRACY TO ELIMINATE PRICE COMPETITION BY TERMINATING A DISCOUNTER IS A *PER SE* VIOLATION OF THE ANTITRUST LAWS

Resale price maintenance is illegal *per se*. This clear rule, although much vilified in certain sectors of academia and under close inspection by lower courts in the past few years, has nonetheless survived. It remains a pillar of antitrust jurisprudence and the source of support for the mass retailing industry and its price-conscious customers. It is a rule which rests on the well-founded premise that intra-brand price competition is good because it enhances consumer welfare. That is, the rule enforces the national judgment that consumers are far better off if vendors are obligated to compete with each other in pricing products

for resale. *See generally Albrecht v. Herald Co.*, 390 U.S. 145, 157 (1968) (Harlan, J., dissenting). First crafted by this Court over 75 years ago and repeatedly ratified and adopted by Congress over the last two decades, the *per se* rule should not be discarded.[3]

The present case requires the Court to reiterate which vertical price agreements are subject to the *per se* rule.[4] Specifically, does the *per se* ban include an agreement to terminate a retailer because its prices are too low—because it is a "price cutter" or "discounter?" The answer is yes: a conspiracy to terminate a vendor because it is a price cutter is *per se* illegal. That answer is drawn from this Court's precedent in both vertical and horizontal cases and Congressional findings and laws in the area. That answer is drawn as well from common sense: a price "cutter" necessarily is one who "cuts" prices below some acceptable level. An agreement to terminate a vendor because it cuts prices necessarily requires some conscious commitment by the manufacturer and a higher priced vendor to a scheme of maintaining higher retail prices. Such an agreement must be condemned as *per se* illegal under the antitrust laws.

A. The *Per Se* Rule In Vertical Pricing Cases: An Overview

Resale price maintenance agreements—that it, agreements to fix or maintain resale prices—were first declared to be illegal by this Court in *Dr. Miles Medical Co. v.*

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[3] *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 354-55 (1982) ("[A]rguments against application of the *per se* rule in this case therefore are better directed to the Legislature"). *See also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940).

[4] *See Maricopa County*, 457 U.S. at 361-62 (Powell, J., dissenting) ("It is settled law that once an arrangement has been labeled as 'price fixing' it is to be condemned *per se*. . . . The inquiry in an antitrust case is . . . 'to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.'' '") (citation omitted).

John D. Park & Sons Co., 220 U.S. 373 (1911). The case involved a manufacturer of proprietary medicines, Dr. Miles, which fixed the prices of its products at both the wholesale and retail level. A wholesale drug concern, John D. Park & Sons, sought to introduce competition into the distribution of Dr. Miles products by buying them at discount prices and selling them at discount prices. Unhappy that its products were being discounted, Dr. Miles sued Parks & Sons for inducing wholesalers and retailers to breach their contracts. This Court upheld the lower courts' decisions dismissing Dr. Miles' complaint. The Court deemed the manufacturer's price fixing agreements to be illegal *per se*, stating that "agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." 220 U.S. at 408.

The ruling in *Dr. Miles*—that resale price fixing is *per se* illegal—has been affirmed by this Court at every subsequent opportunity it has had to discuss the doctrine.[5]

The Court's most recent pronouncement on resale price maintenance, *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720 (1987), involved a New York statute which sought to impose a resale price maintenance scheme on all New York liquor retailers. Noting first that "[r]esale price

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[5] *See United States v. Colgate & Co.*, 250 U.S. 300, 307-08 (1919); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 452-53 (1922); *United States v. Line Material Co.*, 333 U.S. 287, 307-08 and n.21 (1948); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 39, 43-44 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145, 151-52 (1968); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980); *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-60 (1982); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984); *324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 724 (1987).

maintenance has been a *per se* violation of § 1 of the Sherman Act 'since the early years of national antitrust enforcement.'" 107 S.Ct. at 724 (citing *Monsanto*, 465 U.S. at 761), the Court then observed that resale price fixing is illegal because it "prevents manufacturers and wholesalers from allowing or requiring retail price competition." 107 S.Ct. at 724. In short, resale price maintenance was condemned because it prevented "price competition."

This is the common focus of this Court's resale price maintenance jurisprudence: because intra-brand price competition is a desired goal, the *per se* rule applies to those agreements which "prevent price competition. . . ." *Midcal*, 445 U.S. at 103.

Congress, too, has firmly concluded that all resale price maintenance schemes are *per se* violations of the antitrust laws. In 1975, Congress enacted the Consumer Goods Pricing Act and thereby repealed the "fair trade laws" which had authorized states to permit resale price maintenance.[6] This Court subsequently interpreted the Congressional action as an "express[ion] [of Congress'] approval of a *per se* analysis of vertical price restrictions. . . ." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977). *See Midcal*, 445 U.S. at 102-03. That interpretation is correct, as the legislative history of the Act evidences a clear Congressional endorsement of the *per se* rule.[7]

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[6] Miller-Tydings Act of August 17, 1937, ch. 690, 50 Stat. 693 (amending 15 U.S.C. § 1) (repealed 1975) and McGuire Act of July 14, 1952, ch. 745, §§ 1, 2, 60 Stat. 632 (amending 15 U.S.C. § 45, 45 note) (repealed 1975).

[7] Both the Senate and House Reports on the Consumer Goods Pricing Act provide that resale price maintenance should be illegal *per se*. The Senate Report states:

> This proposed legislation repeals the Miller-Tydings Act which enables the States to enact fair trade laws and the McGuire Act which permits states to enact nonsigner provisions. *Without these exemptions the agreements they authorize would violate the antitrust laws.*

S. Rep. No. 466, 94th Cong., 1st Sess. 1 (1975) (emphasis added) [hereinafter cited as *Senate Report*].

The House Report was even more explicit:

> An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an abvious [sic] form of price fixing. As such it is *per se* illegal under Section 1 of the Sherman Act.

H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as *House Report*].

Both the House and Senate sponsors, in explaining the legislation to their colleagues, emphasized that the effect of the Consumer Goods Pricing Act was to subject resale price fixing agreements to the *per se* standard. For example, Rep. Rodino, Chairman of the House Judiciary Committee and the Subcommittee on Monopolies and Commercial Law and a co-sponsor of the bill, stated, while presiding over Subcommittee hearings, that resale price maintenance would be *per se* illegal on passage of the Consumer Goods Pricing Act:

> Agreements, whether vertical or horizontal, to fix and maintain prices are a classic restraint of trade. They have long been considered per se illegal under our antitrust laws.

Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm., 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *House Hearings*].

Sen. Brooke, the Senate sponsor of the bill, stated:

> Without these Federal statutes [the Fair Trade laws], these interstate price-fixing conspiracies would be in violation of the most basic of our antitrust laws—the Sherman Antitrust Act and the Federal Trade Commission Act.

121 Cong. Rec. 38,049-50 (1975).

The final proof of the purpose of the Consumer Goods Pricing Act of 1975 is found in the statement of then President Gerald R. Ford who, upon signing the bill, stated that the legislation:

> will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws . . . which amended the Federal antitrust laws so

On many subsequent occasions, Congress again declared that resale price maintenance is illegal *per se*. As a recent example, Congress, in appropriations legislation for three

of the last four years, has prohibited the Department of Justice from engaging in any efforts to overturn or alter the *per se* rule. *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102-03 (1983); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 99-180, § 605, 99 Stat. 1136, 1169-70 (1985); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 99-591, § 605, 100 Stat. 3341, 3341-73 (1986).

Even as this brief is filed, Congress continues its efforts to direct the Justice Department to enforce the *per se* rule. *See* H.R. Rep. 2763, 100th Cong., 1st Sess. § 605 (1987); S. 938, 100th Cong., 1st Sess. § 404 (1987); H.R. Rep. No. 182, 100th Cong., 1st Sess. 70 (1987); S. Rep. No. 72, 100th Cong., 1st Sess. 26 (1987).

Congress has not only embraced the *per se* rule, but has defined it to include the concerted elimination of price cutting. In a Report accompanying Congressional enactment of § 605 of Pub. L. No. 99-180, the House of Representatives strongly criticized the "Vertical Restraint Guidelines" issued by the Department of Justice on January 23, 1985 (*See* 1 Trade Reg. Rep. (CCH) No. 687, pt. II, at 1 (Jan. 23, 1985)). H.R. No. 399, 99th Cong., 1st Sess. 14, 16 (1985). The Report concluded that:

> Other "restatements" of law exist in the Guidelines that attempt to dilute or trivialize the generality of the per se rule against price fixing, both horizontal and vertical. The Division claims, again without accompanying authorities, that vertical price fixing is lawful so long as the agreement to fix prices does not set "specific" resale prices and is ancillary to one or more non-price restraints. . . . Such a statement appears to reject or ignore any consideration of the effects of a restraint on price in determining whether there is a price fixing agreement.
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> * * * *
>
> In all these respects, the Guidelines are inconsistent with existing law and are also demonstrably unsound as a matter of policy.

Id.[8]

In sum, Congress continues to emphasize that resale price maintenance—whether it be through the elimination of price cutting or through a direct agreement on specific prices—is illegal *per se*. As has this Court for nearly eighty years, Congress, too, has concluded that intra-brand price competition is a vital goal of antitrust policy. *See Monsanto*, 465 U.S. at 769 (Brennan, J., concurring).

States could authorize otherwise illegal agreements between manufacturers and retailers setting the price at which a product would be sold to consumers.

11 Weekly Comp. Pres. Doc. 1368 (Dec. 12, 1975).

[8] In the legislation condemning the "Vertical Restraint Guidelines," Congress concluded that the "Vertical Restraint Guidelines" did not represent an accurate statement of antitrust law. Congress stated:

> Whereas such policy guidelines are inconsistent with established antitrust law, . . . in stating that vertical restraints that have an impact upon prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices'; . . .
>
> * * * *
>
> Now, therefore, be it
>
> *Resolved*, That it is the sense of the Congress that the antitrust enforcement policy guidelines stated in "Vertical Restraints Guidelines," published by the Department of Justice on January 23, 1985—
>
> (1) are not an accurate expression of Federal antitrust laws or of congressional intent with regard to the application of such laws to resale price maintenance and other vertical restraints of trade; [and]
>
> (2) shall not be accorded any force of law or be treated by the courts of the United States as binding or persuasive; . . . .

99 Stat. at 1169-70.

B. Resale "Price Fixing" Includes A Conspiracy To Eliminate A Price Cutter

In both vertical and horizontal cases, this Court and lower courts have defined "price fixing" to include the concerted agreement to eliminate *price competition.* In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Court reviewed an agreement by major oil refiners to participate in a common effort to purchase, and keep off the market, surplus gasoline. The intent was to "stabilize prices." There was no explicit agreement to set prices at some level, only an agreement to take action to stabilize prices. The Court, applying the *per se* rule, concluded:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent they raised, lowered, *or stabilized prices* they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

310 U.S. at 221 (emphasis added).

More recently, in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) this Court, in a *per curiam* opinion, condemned an agreement among beer wholesalers to refuse to extend interest-free credit to retailers. The agreement was not one to fix prices at "some level," but merely an agreement to eliminate what was, in effect, a discount to retailers. The Court, applying the *per se* rule, stated:

> It is virtually self-evident that extending interest-free credit . . . is equivalent to giving a discount. . . . Thus, credit terms must be characterized as an inseparable part of the price. An agreement to terminate the practice of giving credit is thus tantamount to *an agreement to eliminate discounts*, and thus *falls squarely within the traditional per se rule against price fixing.*

446 U.S. at 648 (footnotes omitted) (emphasis added).

In between *Socony* and *Catalano*, this Court similarly condemned a variety of agreements as *per se* unlawful "price fixing" even where there was no explicit agreement on the level of prices. In *FTC v. Cement Inst.*, 333 U.S. 683, 690-93 (1948), the Court invalidated an agreement to use a specific method of quoting prices. In *United States v. Container Corp. of America*, 393 U.S. 333 (1969), the Court prohibited an agreement by which container manufacturers exchanged price information. That agreement, which apparently had the tendency to stabilize prices, was treated as *per se* illegal, as it "chill[ed] the vigor of price competition." *Id.* at 337. According to the majority, "[s]tabilizing prices as well as raising them is within the ban of § 1 of the Sherman Act." *Id.* Justice Marshall's dissent suggested that he would have joined the majority in condemning the agreement if the evidence showed "a deliberate attempt to stabilize prices." *Id.* at 344. That is, all of the Justices seemed to agree that a conspiracy with the purpose of stabilizing prices is illegal even absent an agreement on prices at some level. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978).

All of these cases view unrestrained price competition as the most critical goal of our antitrust laws. These cases reflect the importance of price as the "central nervous system" of our economy. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) (citing *Socony*, 310 U.S. at 226 n.59). Fairly summarized, these cases—admittedly, all arising in a horizontal context—condemn outright concerted agreements which deliberately tamper with the free market determination of price. They condemn agreements which were intended to stabilize prices, or minimize price competition, even if they did not include a commitment to a

particular price or some level of pricing. All of these cases underscore the purpose of the Sherman Act: to preserve "free and unfettered competition." *Northern Pac. R. Co.*, 356 U.S. at 4-5.

The analysis and the result should be no different in vertical cases—there, too, vigorous intra-brand price competition is a critical goal, as evidenced by continued legislative and judicial affirmation of the *per se* prohibition against resale price maintenance. Congress and this Court have, time and time again, declared that intra-brand price competition is an important goal. Thus, application of horizontal price fixing principles in vertical price fixing cases is appropriate and hardly novel. This Court frequently applies horizontal precedent to vertical settings—and vice versa. For example, this Court recently applied conspiracy standards developed in a vertical case to a horizontal antitrust case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1357, 1360, 1362 (1986) (adopting vertical conspiracy standards of *Monsanto*).[9] So, too, should this Court continue to apply the logic and language of horizontal price opinions to vertical price cases. Indeed, one of the underpinnings of the *per se* rule prohibiting resale price fixing is that the practice is akin to horizontal price fixing between retailers. *Dr. Miles*, 220 U.S. at 408; *Midcal*, 445 U.S. at 103.

Following this rationale, an agreement to eliminate discounts—*per se* illegal in a horizontal setting under *Catalano*—is identical to an agreement to eliminate a discounter—illegal under the *Cernuto* line of cases developed in the appellate courts. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979).[10]

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[9] *See also Kiefer-Stewart*, 340 U.S. at 213-15 (assessing restraint as both horizontal and vertical and applying same analysis).

[10] *See, e.g., Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985); *Ziddell Explorations, Inc. v. Conval Int'l,*

In fact, the logic of the *Cernuto* line of cases is precisely that of this Court in *Socony* and *Catalano* (*id.* at 169):

> If the purpose and effect of the challenged conduct is to restrain price movement and the free play of market forces, it is then illegal *per se.*

That is, a vertical agreement between a manufacturer and a retailer to stabilize prices by eliminating a price competitor—even if not accompanied by a commitment to an exact price or an exact level—is well within the ambit of the *per se* prohibition of *Dr. Miles* and its progeny. Indeed, one need look no further than this Court's seminal decision in *Monsanto* to verify that conclusion: there, the jury was allowed to find, based in large part on evidence of dealer complaints and retail price "stabilization," that there was a *per se* violation of the antitrust laws. *Monsanto*, 465 U.S. at 768-69 n.14 (discussing evidence of retail price "stabilization" as evidence of a "price-fixing conspiracy."). *See also Albrecht*, 390 U.S. at 149 ("the [*per se* illegal] combination with wholesalers arose because they cooperated in *terminating price-cutting retailers.*") (emphasis added).

The Justice Department, in its brief urging the denial of the writ of certiorari, recognizes the power of the horizontal precedent holding that agreements "to eliminate price competition generally serve[] no procompetitive purpose." Department of Justice Brief to Petition Nos. 85-1910 and 85-2094 for a Writ of Certiorari ("DOJ Br.") at 7. Indeed, even in the last few years when it has re-examined enforcement policies, the Justice Department has brought *criminal* charges against companies accused of interfering with price competition by agreeing to eliminate discounts—even absent an agreement to fix prices at some level. *E.g., United States v. Waldbaum,*

Ltd., 719 F.2d 1465 (9th Cir. 1983). *See also Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982), *aff'd on other grounds*, 465 U.S. 752 (1984).

Inc., Crim. No. B-84-51 (D. Conn., indictment filed Aug. 15, 1984). In that case, the Justice Department claimed that an agreement between competing grocery stores to eliminate double coupons was a "price fixing" agreement. That agreement was claimed to be unlawful because it restrained intra-brand price competition between the retailers on those brand name products where manufacturers offered coupons. *See Waldbaum*, 1985-2 Trade Cas. (CCH) ¶ 66,689 (D. Conn. 1984) (sustaining challenge to indictment).

Applying the government's own logic to the present price fixing case compels a comparable conclusion: a concerted agreement by a manufacturer and a higher priced dealer to eliminate brand name product discounts (by terminating a discounter of that product) is illegal because it eliminates price competition.

The Justice Department protests such an application of "horizontal price fixing" precedent to "vertical price fixing" situations by contending that, because some *non-price* vertical restraints may be procompetitive, the Court should "paint[] with a narrower brush," in the vertical field. DOJ Br. at 7. That protest is hollow for several reasons. First, there are also horizontal restraints which are deemed procompetitive, but their existence has not erased the *per se* rule prohibiting naked price fixing. *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 18-23 (1979). The mere existence of some procompetitive restraints has not compelled this Court to eliminate the *per se* rule altogether or to refuse to apply it where the restraint's principal purpose is to restrain price competition. Second, the Justice Department's comments, fairly interpreted, reflect its complete disdain for any *per se* rules in the vertical context (*see Monsanto*, 465 U.S. at 761-62 n.7). That bias, not this Court's precedent, compels the government's suggestion of a "narrower brush." Finally, as the *Cernuto* opinion emphasizes, a conspiracy to eliminate

a discounter, initiated by a higher priced competitor's complaint and desire to avoid price competition at the retail level, cannot be justified as an attempt to promote inter-brand competition at the manufacturer level. *Cernuto*, 595 F.2d at 168.

To be sure, in both horizontal and vertical cases there are lines to be drawn to distinguish *per se* cases from "rule of reason" cases. But, in both areas, the line must be and can be drawn in a way which condemns agreements whose substantial purpose is to stabilize prices by eliminating price competition. In such cases, the probability is extremely high that the consequences are anti-competitive and, as a result, the *per se* rule should apply. *See NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984). Congress and this Court have repeatedly drawn a line that is transgressed by the court's opinion below. An agreement which has as its purpose the elimination of price discounts—to be distinguished from other vertical agreements which may tolerate *price* competition—is *per se* unlawful.

If further support were required for this proposition, Congress has recently supplied it. Congress recently condemned the Justice Department's "Vertical Restraint Guidelines." In Pub. L. No. 99-180, § 605, 99 Stat. at 1169-70, Congress rejected the Department's Guideline which stated that the *per se* rule against vertical price fixing applies *only* where "[t]here is direct or circumstantial evidence (other than effects on price) establishing an explicit agreement as to the specific prices at which goods or services would be resold." 1 Trade Reg. Rep. (CCH), *supra* p. 12, at 10. Congress rejected that statement: there need not be an explicit agreement on specific prices in order to invoke the *per se* rule. 99 Stat. at 1169-70. Applying that Congressional directive here, the jury's verdict must stand: the agreement between Sharp and a higher priced retailer to eliminate Business Electronics because it was a discounter is illegal price fixing.

II. IN THE CONTEXT OF THE ENTIRE TRIAL, THE JURY INSTRUCTIONS WERE APPROPRIATE

The final reason to affirm this jury verdict—albeit a reason that pales in significance to decades of antitrust precedent and precise Congressional directions on this issue—is derived from defendant Sharp's own package of proffered jury instructions. Among other instructions, Sharp also requested an instruction (No. 24) which required that the jury find an agreement "to eliminate price competition." [11] In so doing, Sharp recognized that

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[11] Defendant's Requested Jury Instruction No. 24: "Necessity of Manufacturer Motive To Fix Prices":

> When a dealer demands that a manufacturer terminate another existing dealer—in effect tells the manufacturer "You must choose between him or me"—even if the dealer is motivated by a desire to eliminate price competition, it is not in and of itself illegal for the manufacturer thereafter to terminate the existing dealer. *Instead, it must be shown that the manufacturer agreed with the complaining dealer to terminate the existing dealer and that, in so agreeing, the manufacturer shared with the complaining dealer the same desire of eliminating price competition for the complaining dealer.*
>
> Thus, for plaintiffs to establish in this case an agreement between Mr. Hartwell and Sharp that unreasonably restrains trade, they must show (1) that Sharp agreed with Mr. Hartwell to terminate plaintiffs' dealership, and (2) not only that Mr. Hartwell was motivated by a desire to eliminate price competition but also that *Sharp was motivated by the same desire to eliminate price competition* for Mr. Hartwell. In other words, even if you conclude that Mr. Hartwell and Sharp agreed that plaintiffs should be terminated and that in making the agreement Mr. Hartwell was motivated by a desire to eliminate price competition, you cannot find an agreement that unreasonably restrains trade unless you also find that *Sharp was motivated by the same desire to eliminate price competition* for Mr. Hartwell. Otherwise, there would be no unity of purpose, or common design and understanding, or meeting of the minds, which is essential to a conspiracy. (emphasis added).

See also Joint Appendix to Petition No. 85-1910 ("JA") at 14-19 (Court's Instructions To The Jury); *Business Electronics Corp. v. Sharp Electronics Corp.*, No. H-78-1020 (S.D. Tex. 1984): Defendant's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial at 2-3, 8; Brief in Support of Defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For a New Trial at 11-12. Transcript of Proceedings at 1598-99, 1602.

a plaintiff does not need to prove an explicit agreement on resale prices "at some level." In turn, the trial court did not issue the particular instruction subsequently mandated by the appellate court (*i.e.*, proof of agreement to "some level" of prices) for the good and sufficient reason that defendant Sharp had not consistently insisted on that instruction.[12]

Rather, the district court instructed the jury that "[t]he Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer *because of the other dealer's price cutting.*" Joint Appendix to Petition No. 85-1910 ("JA") at 18 (emphasis added).

Subsequently, in its Motion for a New Trial, Sharp affirmed its acceptance of the "elimination of price discounter" instruction. Sharp contended that the trial court "erred in failing to give [Sharp's] Requested Jury In-

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[12] Sharp did request an instruction that there must be an agreement "to fix or maintain prices of Sharp calculators at a certain level and not just that the agreement may have had some effect on price." Defendant's Requested Jury Instruction No. 23 (JA at 7). That instruction, taken as a whole, was improper for several reasons.

The instruction stated that, "*anytime* a manufacturer terminates a dealer and replaces him with another dealer, or appoints an exclusive dealer [it is] *perfectly legal* under the antitrust laws. . . ." *Id.* (emphasis added). That is a gross misstatement of the antitrust laws. Dealer terminations, if done pursuant to non-price vertical agreements, are subject to a "rule of reason" inquiry of legality—they are not *per se* legal. *E.g., Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

Moreover, if a dealer is terminated pursuant to a resale price maintenance scheme, that termination is *per se* illegal; it is not "perfectly legal." *E.g., Monsanto*, 465 U.S. at 761, 763.

truction No. 24 to the effect that plaintiff was required to prove that, in terminating its dealership, both Sharp and Hartwell [the complaining dealer] were motivated by the same desire to *eliminate price discounting*." Defendant's Motion for Judgment Notwithstading the Verdict or, in the Alternative, For a New Trial at 8 (emphasis added).

On the critical issue before this Court, then—the need for proof of an agreement on prices "at some level"—Sharp's proposed instruction No. 24 was no different than the one actually given to the jury. Both instructions required the same finding that there had been an agreement to eliminate price competition. The variety of terms used—an elimination of "price competition," or "price discounting," or "price cutting" are synonymous. Thus, in light of the litigants' proposals to the trial court, the trial court did not err in instructing the jury as it did.[13]

In *United States Gypsum Co.*, this Court found the jury instructions regarding participation in a conspiracy, while not as clear as they might have been, nevertheless were "sufficient" and "substantially in accord with those generally given in similar antitrust cases." 438 U.S. at 463. The Court further noted that "in any event, the disputed instruction differed only in minor and immaterial respects from the instruction requested by respondents. *Id.* So too, the disputed instructions in the present case are in accord with those generally given in similar antitrust cases and, in any event, differed in *only* minor and immaterial ways from one of the instructions requested by Sharp. Given the more than ample existence of "price fixing" in this record, the jury's verdict and trial court's judgment should be affirmed.[14]

[13] The actual instructions given to the jury were also in accordance with the now-current ABA model jury instructions for antitrust cases which approve an instruction prohibiting "price stabilization." A.B.A. Sec. Antitrust, Antitrust Civil Jury Instructions at 92-93 (1980 and Supp. 1986). These instructions are also in accord with the *Monsanto* opinion, which, in part, focused its attention on vertical conspiracies which "stabilize resale prices." 465 U.S. at 758 n.2. Price "stabilization," of course, does not require an explicit agreement on prices at some level, but only an agreement to remove price competition and thereby stabilize prices.

[14] We note that the record did show ample evidence that the manufacturer, Sharp, and its high-price customer, Hartwell, did try to fix and stabilize prices at a higher level. Sharp asked Business Electronics ["BEC"] to "clean up [its] pricing structure" and "sought BEC's adherence to the suggested retail price list." Appendix A to Petition No. 85-1910 for Writ of Certiorari by Business Electronics ("App.") at 5a, 15a. Hartwell "complained vigorously" to Sharp about BEC's low prices. *Id.* Hartwell even tried to engage BEC in a price fixing agreement between the two retailers. *Id.* Hartwell "usually" sold the product at Sharp's suggested prices. *Id.* at 6a.

We note also that one of the trial court's instructions did instruct the jury that the case involved "resale price fixing." (JA at 17) ("In determining whether Sharp illegally combined or agreed with another party to fix retail prices. . . .").

In this context—the instructions as a whole, the record evidence, and the defendant's own proposed instruction No. 24—the jury verdict can easily be sustained. Under circuit precedent, it should have been. *Bunch v. Walter*, 673 F.2d 127, 131-32 (5th Cir. 1982).

CONCLUSION

Resale price fixing is illegal *per se*. In order to promote intra-brand price competition, Congress and this Court have repeatedly affirmed this rule. Resale price fixing includes conspiracies to eliminate a discounter. Such conspiracies, aimed at the elimination of intra-brand price competition, deny consumers the benefits of "free and unfettered" price competition. The *per se* rule proscribes the conduct of Sharp and Hartwell in this case. For the above reasons, the decision of the Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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